No. 293

Office - Supreme Court, U.
FILED
JUL 21 1941
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

JAMES A. TILLMAN,

Petitioner,

AGAINST

THE NATIONAL CITY BANK OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JEFFREY PRESS, INC.

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AGAINST

THE NATIONAL CITY BANK OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

James A. Tillman prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered on April 22nd, 1941 (R. 566) affirming the judgment of the United States District Court for the Southern District of New York, dismissing the complaint at the close of the whole case and withdrawing it from the jury (R. 7-8).

Opinions Below.

The oral opinion of the District Judge Goddard (R. 9-11) is not reported. The opinion of the United States Circuit Court (R. 558-565) is reported in 118 Fed. (2nd) 631.

Jurisdiction.

The decree of affirmance of the United States Circuit Court of Appeals was entered on April 22nd, 1941 (R. 566). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A., Sec. 347).

Questions Presented.

In this action the plaintiff claimed the repayment of moneys deposited by his assignor, William Sewell, a British subject, with the Petrograd, Russia, branch of the defendant (R. 12-18). It was conceded that the moneys were received by said defendant's branch and not repaid to him. The Circuit Court of Appeals sustained the dismissal on two grounds of our law, i. e., res judicata and statute of limitations, and the defenses based on Soviet law (R. 558-565).

The Circuit Court conceded that the two defenses based on our law were governed by New York State decisions. It admitted that there was a decision contrary to its ruling in this case in *Nathan* v. *Uhlmann*, 101 A. D. 388, affirmed 184 N. Y. 606, but erroneously refused to follow it as based on a dictum. On the statute of limitations, the Circuit Court pretended to follow the decision of Referee Tweed in *Dougherty* v. *National City Bank*, 157 Misc. 849, rejecting the decisions of the higher New York courts to the contrary (*Sokoloff* v. *National City Bank*, 130 Misc. 66, affirmed 223 A. D. 754 and 250 N. Y. 69; *Sickle* v. *Herold*, 149 N. Y. 332; *Richards* v. *National City Bank*, 231 A. D. 559, 566; *Bank of the United States* v. *National City Bank*, 123 Misc. 801, affirmed 214 A. D. 716).

As to the Soviet law, the Circuit Court purported, again, to follow the same decision of Referee Tweed, upon the erroneous assumption that Section 34 of the Judicial Code applies to a law of a foreign state involved in a suit pending in the Federal Court.

This suit was brought in the United States District Court pursuant to the provisions of the Act of June 16th, 1933 (Chap. 89, Par. 15, 48 Stat. 184; 12 U. S. C. A., Sec. 632).[1] Under this section Federal courts are given *original* jurisdiction in actions involving transactions of the foreign branches of national banks, which transactions the statute

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[1]See text infra at page 10.

directs shall be "deemed to arise under the laws of the United States".

Section 34 of the Judicial Code[2] is not applicable, because:

1. It expressly excepts from its operation those cases where "the rules of decision" are required by the statutes of the United States to be other than "the laws of the several states".

2. It applies only to the cases wherein the jurisdiction of the Federal Courts rests solely on the diversity of citizenship, and not where it is based upon original jurisdiction.

3. It applies to "the laws of the several states", and not to the law of a foreign country.

4. It directs the application of "the laws of several states" only "in cases where they apply", and they do not apply to a case concededly governed by the law of a foreign country.

A similar question was recently raised by the United States Government in an application for a writ of certiorari to the Supreme Court of New York in *United States* v. *Pink*, which was granted by this Court (312 U. S. ; 85 L. Ed. 862). There the question presented was whether the state law or the law of foreign country in a matter involving Federal right should be governed by the state or the federal law. Here the question presented is, whether in a case required by the federal statute to be governed by federal law, is the Federal court bound, under Sec. 34 of the Judicial Code by the interpretation of a law of a foreign country made by the State Court. The two cases represent two aspects of the same problem and should be heard together by this Court.

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[2] 28 U. S. C. A., Sec. 725. **Laws of States as rules of decision.** The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply (R. S., Sec. 721).

Statement.

Plaintiff's assignor, William Sewell, a British subject (R. 77), deposited in June, 1917 with the Petrograd, Russia, branch of the defendant, a national banking association, 150,000 rubles repayable on demand with interest at 3% per annum (R. 279). On August 26th, 1918 defendant closed its Petrograd branch on advice of the United States Consulate General (R. 293). Sewell never made a demand for the repayment of his deposit in Russia (R. 81), but addressed such request to defendant's head office in New York on December 8th, 1931 (R. 279-280).

Three months later, i. e., on December 2, 1918, the Soviet Government enacted the first statute directing liquidation of branches of foreign banks in Russia (R. 508-9). The statute and Soviet regulations thereunder (R. 479-81) provided for elaborate machinery to carry out this liquidation, to be set up by the branch of the foreign bank itself. At that time, neither Sewell nor the defendant were in Russia, and the statute in its text, did not apply to defendant, being limited to *existing* branches of foreign banks. *Defendant never made any attempt to comply with the Soviet statute, and never transferred the accounts of its depositors to the appropriate Soviet institutions.*

On June 14th, 1932 Sewell assigned all of his claims against the defendant arising out of said deposit to one G. Frank Dougherty (R. 282), who reassigned Sewell's claim to the plaintiff herein on October 19th, 1936 (R. 283). Between those two dates Dougherty tried a case in a State Court before a referee, involving four other deposits, assigned to him by others than Sewell. (*Dougherty* v. *National City Bank,* 157 Misc. 849.)

The plaintiff brought this action on July 1st, 1937 to recover upon the *ultimate liability* of the defendant for its debt to Sewell (R. 12-18). No cause of action for frustra-

tion of checking relationship, nor for the rescission or breach of the checking contract was asserted by the plaintiff.

Defendant's answer set up a discharge of its obligation to the plaintiff, because by the terms of its Russian rules its depositors agreed to abide by any future laws of Russia relating to the discontinuance of the operations of its Russian branches; because the Soviet decrees relating to the closing of branches of foreign banks in Russia were confiscatory; because the specific ruble currency which Sewell paid to the defendant had no value at the time payment was demanded; and because of the bar of the statute of limitations (R. 18-28).

Upon the trial, the District Court refused to admit the uncontradicted testimony of an expert on Russian law on the ground that it was for the Court alone, unaided by the expert, to construe foreign law, and that because the testimony of the expert tended to vary the direct meaning of the foreign written laws and called for the opinion of the expert and operation of his mind. It denied the plaintiff the right conferred by the Federal Rule of Procedure 43c to state specifically the nature of evidence which the plaintiff desired to prove by his expert. Defendant did not cross-examine the expert nor offered testimony by its own expert (R. 192-3; 228-30; 237-9).

The Court then placed its own construction on the Soviet law, and dismissed the complaint at the end of plaintiff's case, incidentally deciding in its opinion a number of material and disputed questions of fact, although the plaintiff demanded submission of these facts to jury (R. 9-11, 273).

The Circuit Court affirmed (R. 558-565), sustaining the rulings of the District Court on the exclusion of evidence of an expert on Soviet law; refused to consider on the merits the substance of foreign law as to alleged confisca-

tion, novation and the value of rubles, but deemed itself bound by the interpretation by the referee in the Dougherty's State suit; declared that decisions of the State court holding that prior adjudications in actions by an assignee on deposits assigned to him by others not to be a res judicata as to claims assigned to him by different depositors, were mere dicta; and erroneously applied state decisions on the statute of limitations dealing with actions based on rescission or frustration as applicable to the plaintiff's claim based on the ultimate liability for a debt.

The decision of the Circuit Court misinterpreted the State law, misunderstood the application of Section 34 of the Judicial Code, as interpreted by this Court in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, denied to the plaintiff the benefit of the Fifth and Seventh Amendments to the Federal Constitution, and introduced a diversity of practice in various circuits in regard to the proof of foreign law and the meaning of several rules of Civil Procedure in Federal courts.

Specification of Errors to Be Urged.

The United States Circuit Court of Appeals for the Second Circuit erred:

1. In holding that in the case specifically directed by the Federal statute to be deemed to "arise under the laws of the United States" (12 U. S. C. A. 632) the Federal court should adopt as a rule of decision the law of the state, where the court is located.

2. In holding that in a case wherein the Federal Court has original jurisdiction, it is bound by the state rules of decision or bound by the provisions of Section 34 of the Judicial Code.

3. In failing to hold that the provisions of Section 34 of

the Judicial Code are not applicable to a case arising out of transactions of a branch of a national bank in a foreign country where reliance is made not on the State, but on a law of such foreign country.

4. In failing to hold that it is the duty of a Federal Court deciding a transaction, arising outside of the several states, territories and possessions of the United States, to construe for itself the law of the place where the transaction occurred.

5. In holding that the Federal court in a matter involving foreign written law may refuse pertinent testimony of an expert, and decide the questions of foreign law upon its own understanding of foreign statutes and decisions and exclude the testimony of experts.

6. In failing to hold that the District court erred in rejecting an uncontradicted evidence of plaintiff's expert on foreign law.

7. In failing to hold that the District court erred in excluding the evidence of an expert on foreign law on the ground that the same tended to vary the literary meaning of foreign written law, and called for the opinion of the expert and the operation of his mind.

8. In failing to hold that the District court erred in applying to the transactions herein involved Soviet law, which was not retroactive in its effect and which did not exist at the time the transactions herein involved took place.

9. In failing to hold that the District court erred in denying to plaintiff the protection of the Fifth and Seventh Amendments to the Federal Constitution by refusing to submit to a jury in a common law case the disputed facts upon which the application of foreign law was based.

10. In failing to correctly construe the State law of New York in regard to the statute of limitations and res judicata.

11. In failing to hold that the District court erred in allowing a proof of the alleged res judicata without a plea therefor, as required by Civil Procedure Rule 8, Subdivision c.

12. In failing to hold that the District court erred in denying to the plaintiff the right conferred on him by Civil Procedure Rule 43, Subdivision c to make a specific offer of the excluded evidence on the record.

13. In failing to hold that the District Court erroneously ruled on the specific objections to the exclusion and admission of evidence, contrary to provisions of Civil Procedure Rule 46.

14. In affirming the judgment of the District Court for the Southern District of New York, dismissing the complaint.

15. In affirming the order denying the motion for a new trial.

Reasons for Granting the Writ.

The review of the decision of the Circuit Court of Appeals is asked, because it incorrectly interprets the application of *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, in extending it to transactions governed by the law of a foreign country and not one of the several states; because it establishes diversity of decisions between various circuits upon the important question of the proof of foreign law in Federal courts; because it interprets three new rules of civil procedure contrary to the interpretations made in other circuits, and because it misapplied State law.

1. The Court below expressly refused to examine the merits of plaintiff's case. With regard to the value of rubles, it said "We shall not review the decisions of the New York Courts * * *" (R. 564). With regard to the statute of limitations it said "This result was in accordance with various decisions of the New York Courts" (R.

564).[3] With regard to the discharge by Russian decrees and acts, it said "We agree with Mr. Tweed * * *" (R. 564).[4]

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[3]The Circuit Court relied on Tillman v. Russo-Asiatic Bank, 51 Fed. (2d) 1023, in which it denied recovery for rubles on the ground that "There is no proof of equivalence" between the Soviet rubles and the earlier rubles. This proof was supplied here. Dougherty v. Equitable Life Assurance Society, 266 N. Y. 71, dealt with obligations payable in specific issue of rubles. (Cf. Parker v. Hoppe, 257 N. Y. 333, 339-40, where rubles generally were payable.) L. C. Smith & Bro. Typewriter Co. v. Credit Lyonnais, 266 N. Y. 126, and Klochkov v. Petrogradski M. C. Bank, 266 N. Y. 596, refused recovery because the rubles on the due dates ran into billions for a dollar, and no proof of other equivalence was tendered to the court. Here the plaintiff specifically pleaded the method of equivalence prescribed by Soviet law. [Complaint. "Par. 39. That in 1931 and now, the law of Russia was and is that in case of redemption of a particular issue of ruble currency in circulation at the time a contract payable in money is made, such contract, if discharged at the time another issue of ruble currency is in circulation, must be paid in such proportional number of units of the new ruble currency as the ruble currency at the time of the making of the contract bears to the ruble currency in circulation at the time of the discharge, both currencies being measured in gold or in the terms of a gold ruble" (R. 17).]

[4]The Circuit Court cited Dougherty v. Equitable Life Assurance Society, 266 N. Y. 71, as upholding discharge by Soviet decrees, but in that case the Equitable remained in Russia and carried out Soviet liquidation decrees. Zimmerman v. Sutherland, 274 U. S. 253, again dealt with a case where the bank paid over the deposit in accordance with the foreign law. U. S. v. Belmont, 301 U. S. 324, dealt with pleadings in which the defendant admitted that title passed by Soviet law. In Dougherty v. National City Bank, 157 Misc. 849, the findings of the Referee, except as to the lack of deposit relationship on the first cause of action and the bar of the second and third causes of action were mere dicta. ["Strictly, it is unnecessary to consider the other defenses. However, for the sake of completeness and to assist counsel in the preparation of findings, I shall state my conclusions with respect to the sufficiency of these defenses as applied to a cause of action for breach of contract or rescission and restitution" (Referee Tweed at p. 861).]

Besides, foreign law confiscating property without actual seizure of property intended or as aptly called 'confiscation by proclamation', is not recognized as a defense in the State Courts (Frenkel & Co. v. L'Urbaine Fire Ins. Co., 251 N. Y. 243, 249), nor in the Federal courts (Compania Espanola v. Navemar, 303 U. S. 68, 75 and 76).

In this case the jurisdiction of the Federal Court does not rest on diversity of citizenship. It is based upon the express provisions of the Act of June 16th, 1933, Chap. 89, Par. 15, 48 Stat. 184 (12 U. S. C. A., Sec. 632).[5]

Under Section 34 the State Law is only applicable where the jurisdiction of the Federal Court rests on diversity of citizenship (*Griffin* v. *McCoach,* 61 Sp. Ct. 1023, 1925; *Klaxon Co.* v. *Stanton Elect. Mfg. Co.,* 61 Sp. Ct. 1020, 1021; *West* v. *American Telegraph and Telephone Co.,* 311 U. S. 223, 231; *Six Companies* v. *Highway District,* 311 U. S. 180, 188).

The control and regulations of foreign and interstate commerce have been entrusted by the Constitution to the Federal Government. In these channels of commerce the framers of the Constitution intended that there should be a uniformity established by the Federal Government and sustained by the Federal Courts.

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[5]U. S. C. A., Sec. 632. **Jurisdiction of United States district courts in cases arising from foreign banking.** Notwithstanding any other provision of law all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, either directly or through the agency, ownership, or control of branches or local institutions in dependencies or insular possessions of the United States or in foreign countries, shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any defendant in any such suit may, at any time before the trial thereof, remove such suits from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law. Such removal shall not cause undue delay in the trial of such case and a case so removed shall have a place on the calendar of the United States court to which it is removed relative to that which it held on the State court from which it was removed.

The foreign law is a fact (*Huntington* v. *Attrill,* 146 U. S. 657, 678; *Mexican National R. Co.* v. *Slater,* 115 Fed. 693, 606, affirmed 194 U. S. 120). Foreign law is a question of fact also in the State Courts of New York (*Holzer* v. *Deutsche Reichsbahn,* 277 N. Y. 474, 479, 480; *Dougherty* v. *Equitable Life Ass. Soc.,* 266 N. Y. 71, 102; *Fitzpatrick* v. *International Ry. Co.,* 252 N. Y. 127, 139). Section 34 does not direct Federal Courts to follow State Courts on questions of fact.

Neither Section 34 is applicable where the transaction did not arise within any of the states of the American Union, the State laws being made applicable in the language of this section only "in cases where they apply". It is the recognition of this fact by the Congress that foreign transactions do not arise under the laws of several states that prompted it to enact the law of June 16th, 1933, whereby foreign financial operations of corporations organized under the Federal laws "shall be deemed to arise under the laws of the United States". Where the laws of the United States are involved, this Court repeatedly held that it will not be governed by the interpretation of the local law by the State Courts (*Diaz* v. *Gonzales,* 261 U. S. 102, 105; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 366).

The decision of the Circuit Court is not only in direct conflict with Section 34 of the Judicial Code, which exempts from its operation cases "where * * * statutes of the United States otherwise required", but also with the Act of June 16th, 1933, because it is expressly directed against the application of "any other provision of law", regarding "all suits of a civil nature at common law or in equity".

The matters involving foreign transactions already forming an important part of the business of the Federal Courts, are rapidly rising in volume proportionately to the increasing importance of this country in international affairs. It will greatly benefit the administration of justice

in this country if the Federal Courts will have before them the ruling of this Court whether or not they are bound by the rulings of the State Courts on foreign law, or whether they are to ascertain it for themselves as any other question of fact.

2. The Circuit Court of Appeals held that it was proper for the District Court to exclude the evidence of an expert on Russian law because it "related to matters clear enough from the documentary proof to be dealt with by the Court without expert aid" (R. 565). The Court further said: "The admission of further expert testimony would have only involved a long battle between experts as to the law of a nation under which our system of judicial precedent does not exist and where decrees and regulations are controlling. The experts would be engaged in analyzing written instruments, the proper interpretation of which the court must finally determine. How far this was to be permitted in reason was within the fair discretion of the trial court" (R. 565).

That the Trial Court has authority to exclude expert evidence on foreign law, because the foreign law is contained in written statutes and decisions, is both novel and startling. It disregards a number of decisions of this Court (*Diaz* v. *Gonzales*, 261 U. S. 102; *Eastern Building and Loan Ass'n* v. *Williamson*, 189 U. S. 122; *Finney* v. *Guy*, 189 U. S. 335; *The Asiatic Prince*, 108 Fed. 287, cert. den. 183 U. S. 697).

These rulings are in direct opposition to the rulings in other circuits and introduce a confusion in the existing law.

Mr. Justice Story (*Conflict of Laws*, Sec. 557, 558 and 563) laid down a rule that it is an error to exclude evidence of an expert on foreign law, where foreign law is pertinent to the decision of the case. The Fifth Circuit so held in *Mexican National R. Co.* v. *Slater*, 115 Fed. 593,

608, and was affirmed by this Court in 194 U. S. 120. The Fourth Circuit so held in *Manchester Ltd.* v. *Virginia Carolina Chemical Co.,* 194 Fed. 463, 472-474, affirmed 204 Fed. 564. The English Court of Appeal expressly held that the decisions and statutes on foreign law are received "not as evidence per se, but as a part of the testimony of the witness" on foreign law (*Concha* v. *Murrieta,* L. R. 40 Ch. Div. 543).

The Canadian Court, which certainly could have understood American statutes by himself, said in *U. S.* v. *Webber* (N. S.), 5 Dom. L. R. 866:

> "I think that the question of what the law is in a foreign jurisdiction is a question of fact and not a question of law for me, therefore I feel bound to accept the evidence of the legal expert from the United States."

The novel power conferred upon the trial court by the Circuit Court of Appeals in both understanding intuitively the system of foreign law and in construing foreign statutes and decisions unaided by an expert, not only introduces diversity of practice in this respect, but presents a grave danger in its application.

Our courts in dealing with our own law take extensive briefs of lawyers, hear hours of argument from them, spend many hours in the library investigating the question of domestic law, and yet, according to the ruling, when foreign law is presented to our courts, they immediately become self-sufficient, and without any aid whatsoever from an expert on foreign law, they should be able to understand not only the particular statute before them, but all the history of foreign legislation leading to it, the preceding and subsequent judicial interpretation, and the method of dealing with it prescribed by foreign jurisprudence.

3. The plaintiff objected on the trial to the introduction of the evidence of the judgment and the findings in the

Dougherty case in the State Court on the ground that it was not pleaded as required by Rule 46 of Civil Procedure. The Circuit Court held[6] that such evidence could be introduced without a proper plea, contrary to express provisions of Rule 8 of Civil Procedure, subdivision c.

The Circuit Court relied on *Southern Pacific R. R. Co.* v. *United States,* 168 U. S. 1, where this Court held that under Equity Rule 45 the party was not "required to set out in its pleading what was merely evidence to support its title to the lands in controversy". At the same time, this Court ruled that "But when a former recovery is to be relied on by the plaintiff it can only be necessary to amend the bill *when the rules of pleading imperatively require that to be done in order to obtain the benefit of such recovery".* Such is the requirement of Rule 8, subd. C. (*Holmberg* v. *Hannaford,* 28 Fed. Supp. 216).

The plaintiff assigned as errors rulings of the District Court on the evidence of the plaintiff's expert on Russian law, which was excluded on the ground that it called for the operation of the expert's mind, for his opinion and his conclusions, and that it tended to vary written evidence on Russian law (Assignments 4 and 5, R. 4). The Circuit Court apparently admitted that the District Court erred in its rulings, but sustained the rulings on the ground that the questions were "bad in form" (R. 565).

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[6]The Circuit Court erroneously said that plaintiff made no objection during the trial to the admission of evidence, because it was not pleaded, and referred to page 52 of the Record, at which place no question of admission of the Dougherty record was in issue. The record shows at page 244:

> "Mr. Sprung: Before the plaintiff rests, may I be permitted to make a motion to strike out all the evidence and all the exhibits dealing with the Dougherty case in the Supreme Court and the other cases introduced for the purpose of showing an estoppel **on the ground that an estoppel is a defense and it has not been pleaded?"**

Civil Procedure Rule 46 requires that the objecting party should state "his ground therefor". The defendant did not object to the form of these questions. It is well settled in other circuits that on appeal, the question involved is the propriety of the ruling *as made* to the objections *as proffered* The grounds not stated cannot be considered on appeal (*Katahdin Pulp & Paper Co.* v. *Peltomaa,* 156 Fed. 342, 344 [First Circuit]; *Atlantic Coast R. Co.* v. *Lindstedt,* 184 Fed. 36, 38 [Fourth Circuit]; *Massenberg* v. *Denison,* 107 Fed. 18, 21 [Fifth Circuit]; *Ward* v. *Blake Mfg. Co.,* 56 Fed. 437, 441; *U. S. Shapleigh,* 54 Fed. 126, 137 [Eighth Circuit]; and *Northern Pacific R. Co.* v. *Charless,* 51 Fed. 562, 571 [Ninth Circuit]).

The plaintiff also assigned as an error (Assignment 23, R. 6) the denial of the District Court of his specific offer of evidence which he desired to prove by his expert on Russian law, as provided in Rule 43 of Civil Procedure, subdivision c. The Circuit Court evidently thought that even the appellate courts should not know what the true interpretation of Russian written law is, but that they should be bound by the personal notion of it as entertained by the District Court. Rule 43 vests no such discretion in the court, but gives a party a right to preserve on the record the nature of proof excluded, thereby permitting the appellate court to determine the pertinency and materiality of excluded proof.

If new Federal rules of Civil Procedure are to receive uniform application and interpretation, their meaning should be early settled by this Court. The diversity of rulings here presented should be eliminated to avoid confusion in application and interpretation of said rules.

4. The Circuit Court erroneously interpreted the St law on the only two questions upon which it was pertinent, i. e. res judicata and statute of limitations. The Circuit Court conceded that in *Nathan* v. *Uhlmann,* 101 A. D. 388, the Appellate Division of New York held that the pr

judgment obtained by an assignee of several depositor holding assignments from other depositors at the same time, is not a res judicata as to the claims of these other depositors in actions subsequently brought upon them by the assignee. It conceded that there is no decision of the Court of Appeals upon the subject, but argued that the decision of the Appellate Division was a mere dictum. In *Nathan* v. *Uhlmann,* the complaint was dismissed in the Supreme Court and judgment entered in favor of the defendant. The plaintiff appealed to the Appellate Division claiming that the judgment obtained by the plaintiff on the claims of the other depositors against the same defendant and involving precisely the same facts, was res judicata and that the Supreme Court erroneously excluded it from evidence, and that the Court has made certain errors in the charge to the jury.

The Appellate Division overruled the first ground of appeal, holding that the prior judgment was not a res judicata, but sustained the second ground and granted new trial. That was a direct ruling upon the first ground of appeal.

The defendant appealed to the Court of Appeals and gave the stipulation required by statute (N. Y. Civil Practice Act, Sec. 605) consenting to judgment absolute against him if his appeal failed. The Court of Appeals affirmed (184 N. Y. 606) without opinion. Such affirmance was an express holding by the Court of Appeals that *all* the rulings of the Appellate Division were correct because the duty of the Court of Appeals upon such appeal was "to determine whether *any* error was committed by the Court below in ordering a new trial" (*Hoyt* v. *Thompson's Executor,* 19 N. Y. 207, 212). The entry of the judgment in such case is automatic and does not reflect the opinion of the Court of Appeals, because in cases where a party appeals in New York to the Court of Appeals from a judgment of the Appellate Division granting a new trial, such

party "necessarily determines for himself that no further or better conclusions of fact can be found in his favor, and that on a new trial judgment must be given against him" (*Hoyt* v. *Thompson's Executor,* supra, at page 211).

The reason of the Appellate Division in holding that the prior judgment was not res judicata lay in the fact that but for the assignment, one depositor would not be bound by a judgment rendered against another depositor, and that the assignment did not add to or detract from the rights of the assignor.

There are other pertinent grounds why, in this case, the decision of the State Referee was not res judicata. The doctrine of res judicata requires identity of the subject matter, and the account of one depositor is a different subject matter than the account of another depositor (*Bigelow* v. *All Dominion Copper Co.,* 225 U. S. 111, 128, 129; *Litchfield* v. *Goodnow's Adm.,* 123 U. S. 549, 551; *Hart* v. *Moulton,* 104 Wisc. 349, 354, 355).

Furthermore, it requires an adjudication on the merits and not a judgment entered by stipulation (*Larme Estates, Inc.* v. *Omnichrome Corp.,* 275 N. Y. 426; *Roderigas* v. *East River Savings Inst.,* 76 N. Y. 316, 322, 323).[7] The judgment entered in the *Dougherty* case by Referee Tweed was based on stipulation of the controlling facts (*Dougherty* v. *National City Bank,* 157 Misc. 849, 869).

The Circuit Court of Appeals also misunderstood the decision of Referee Tweed, as to the statute of limitations.

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[7]The Circuit Court of Appeals referred to Crouse v. McVickar, 207 N. Y. 213, 217, but the case is not in point because it did not deal with res judicata. In Tait v. Western Md. Ry. Co., 289 U. S. 620, this court said that the stipulation would not affect the application of the doctrine of res judicata "provided * * * **the facts** and **questions** presented on those facts were before the court when it rendered its judgment." Here the record shows that in the Dougherty case the stipulation altered facts and affected questions of law resulting from them (R. 60-61).

In *Dougherty* v. *National City Bank*, supra, the plaintiff asserted three causes of action, the first on the ultimate liability for a debt, the second based on a breach in Russia of deposit contract in 1918, and the third upon rescission. Referee Tweed held that the second and third causes of action were barred by the statute of limitations.[8]

As to the first cause of action, he held that there was no ultimate liability of the defendant for the debts upon the deposits, unless it was established by Russian law, and that no proper proof of Russian law was made to him. He said: *"No Imperial Russian law has been proved* other than Pravila * * *" (page 858) "* * * the plaintiff has the burden of presenting to the court the law which creates the obligation and relationship upon which he relies. *He has presented only the Pravila"* (page 585). "It is not claimed that the Soviet law did anything of the sort, and *no Soviet law on the subject is in evidence"* (page 859). Here, the liability of home office for the debts of its Russian branches was conceded.[9]

The New York Appellate Division thrice held that there is an ultimate liability of the defendant's head office in New York to the depositors of its Russian branches. (*Richards* v. *National City Bank*, 231 A. D. 559, 566; *Bank of U. S.* v. *National City Bank*, 123 Misc. 801, affirmed 214

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[8]"One of the defenses is the New York six-year statute of limitations contained in section 48 of the Civil Practice Act which is limited by section 15. It is a good defense to a cause of action which relies upon the closing of the Russian branches in 1918, either as a breach of the deposit contract or as an excused default entitling the depositor to rescind the contract and have the amount of it restored to him on demand." (Dougherty v. National City Bank, 157 Misc. 849, 860-1.)

[9]Defendant's counsel said: "There is no contention and never has been that if a liability existed and can be proved against the branch that the main corporation would not be responsible for it" (R. 134, and see R. 137).

A. D. 716; *Sokoloff* v. *National City Bank*, 130 Misc. 66, 73, affirmed 223 A. D. 754.)[10]

WHEREFORE, in view of the fact that the decision below is untenable; is contrary to the prior decisions of this Honorable Court; that a diversity of decisions between several circuit exists; and that the important questions of jurisdiction and of general law presented should be settled by this Honorable Court, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Judges of the United States Circuit Court of Appeals for the Second Circuit, demanding them to certify and send to this court a transcript of the records and proceedings in this case, to the end that the decrees of said court may be reviewed, and that your petitioner may have such other and further relief in the premises as to this court may seem appropriate.

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[10]The Circuit Court cited Richards v. National City Bank, 231 A. D. 559, which at page 566, holds directly contrary to its contention. Sokoloff v. National City Bank, 250 N. Y. 69, 80, dealt with a case where the plaintiff made a demand in Russia prior to the closing of the Russian branches. (Bykowsky v. Public National Bank, 209 A. D. 61); Parker v. Hoppe, 257 N. Y. 333, is not in point because it dealt with an action based on rescission.

Verification.

State of New York,
County of New York—ss.:

JAMES A. TILLMAN, being duly sworn, deposes and says as follows:

I am the petitioner herein. I have read the foregoing petition and the same is true to the best of my knowledge, information and belief.

JAMES A. TILLMAN.

Sworn to before me this
17th day of July, 1941.

ARCHER EISENSTAT,
Notary Public.
New York Co. Clk's No. 105.
Term expires March 30, 1943.

Certificate of Counsel.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and the case is one in which the prayer of the petitioner should be granted by this Honorable Court.

BORRIS M. KOMAR,
Counsel for Petitioner.

FILED
AUG 28 1941
CHARLES ELMORE CROPLEY
CLERK

No. 293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

JAMES A. TILLMAN,

Petitioner,

against

THE NATIONAL CITY BANK OF NEW YORK,

Respondent.

ON PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S MEMORANDUM IN OPPOSITION

PHILIP A. CARROLL,
Counsel for Respondent.

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RESPONDENT'S MEMORANDUM IN OPPOSITION

The Opinions Below

The opinion of the Circuit Court of Appeals (L. HAND, A. N. HAND, and CHASE, *JJ.*), unanimously affirming the judgment below, is reported in 118 F. (2d) 631. The oral opinion of GODDARD, *J.*, in the District Court is found in the Record (R. 9-11).

At the close of the entire case Judge GODDARD held that the complaint must be dismissed: (a) because plaintiff's alleged cause of action was barred by the six year New York statute of limitations; (b) because the rubles deposited by plaintiff's assignor in 1917 were worthless at the time any demand for payment was made, when the suit was brought, and at the present time; and (c) because any obligation was discharged by the decrees and acts of the Soviet Government.

The Circuit Court of Appeals agreed with the trial court on each of these grounds and, in addition, held plaintiff barred from recovery by an estoppel by judgment, resulting from the fact that all the basic issues in the case were res judicata by reason of the entry of a prior judgment involving the same issues in an action brought by one Dougherty against the present defendant National City Bank, at a time when Dougherty was the owner of this claim, now assigned to and asserted by the plaintiff.

From the opinion of the Circuit Court of Appeals it clearly appears that it unanimously affirmed the judgment on these four separate grounds, any one of which is sufficient to justify the dismissal of the action.

Statement

This action, the last of a series growing out of the confiscation of defendant's Russian branches by the Soviet Government, is brought by an assignee to recover the claimed value of a Russian ruble deposit, made in 1917 by one William Sewell, a resident of Russia, in defendant's Russian branch at Petrograd (Ex. 6, R. 279).

A few months after the deposit was made in 1917 the Soviet Revolution occurred, so that almost 19 years before this action was brought and before any demand for payment was made, following upon the Soviet Government's policy of making banking in Russia a State monopoly (R. 464), defendant's Petrograd branch was closed, its books, offices and assets seized and taken over by the Soviet Government, its liabilities assumed by the Russian State Bank, later called the Peoples Bank (R. 27, 292-301, 464-466, 468, 471-481), and its American personnel "escorted" across the Finnish border by the Soviets (R. 257).

The defendant National City Bank had been authorized to open its Russian branches by a Russian decree, which expressly provided that the business and discontinuance of operations of its Russian branches "shall be subject to Russian laws and to the orders of the Russian Government,

both those now in force and those which may be hereafter promulgated" (R. 462).

Under a series of decrees promulgated by the Soviet Government, by which all banking business was nationalized and taken over by the Peoples Bank (formerly the State Bank of Russia), it was provided that the Russian assets of foreign banks should be transferred to the Peoples Bank and that sums due depositors should be credited "to the current accounts with the Peoples Bank and shall be recorded in the names of their owners, while the said sums shall be paid in accordance with the existing regulations on current accounts" (R. 481, 471). Our Government recognized the Soviet Government and its decrees on November 16, 1933 (*United States* v. *Belmont,* 301 U. S. 324).

At the time of these various decrees, the defendant, National City Bank, had on deposit with the State or Peoples Bank, rubles far in excess of the total obligations and amounts due to depositors of defendant's Russian branches (R. 300, 251), all of which assets were seized by the Soviet Government.

Moreover, as the result of the extraordinary inflationary measures adopted by the Soviet Government, the rubles which had been deposited by plaintiff's assignor, Sewell, in 1917, concededly became wholly worthless many years before it is even claimed that any demand was made in 1931 (R. 81) for their repayment. The Soviet Government issued vast quantities of paper rubles, at first circulating at parity with the older issues, until all these rubles had become almost worthless (R. 419-427, 482; Katzenellenbaum, Russian Currency & Banking, 1914-1924, pp. 56-57). Then, the Soviet Government issued, successively, new ruble currencies with specified statutory ratios of exchange for the old currency, which was withdrawn from circulation. Thus in 1922 the first of such new ruble currencies was issued, on a statutory basis of exchange of 10,000 of the old for one of the new (Exs. LL, OO and QQ, R. 428-436). In 1923, another ruble was issued, on a statutory basis of exchange of 100 of the 1922 pattern or 1,000,000 of the

pre-1922 pattern for one of the new 1923 pattern (Exs. RR, SS and UU, R. 437-442); and finally, in 1924, the present-day so-called "gold" ruble was issued (circulating only in paper), on a statutory basis of exchange of 50,000 of the 1923 rubles for one of the new 1924 Soviet rubles (Exs. BBB and DDD, R. 447, 451). On the basis of these statutory ratios an obligation expressed in a pre-Soviet ruble was worth at the time of the alleged demand for payment, at the time of the trial, and at the present time, only one fifty-billionth of the present-day Soviet ruble, of the 1924 pattern.

Even according to plaintiff's testimony (R. 98) the present 1924 pattern Soviet ruble had an "official" value of only 51.46¢ in December, 1931, the date of Sewell's alleged demand for payment, and of less than 20¢ by the date of the trial. The actual value of this new Soviet ruble in Russia, even before 1931, however, had fallen far below these figures (Chamberlain, Russia's Iron Age, pp. 342-344; Lyons, Assignment in Utopica, pp. 363, 449-452). Consequently, it is clear that Sewell's deposit of 150,000 1917 rubles has had since 1924 only the most infinitesimal value in terms of American money.

Meanwhile, in 1923, the Soviet Civil Code had outlawed all controversies arising out of civil relationships which originated prior to November 7, 1917 (R. 502).

Such was the situation when in 1931, Sewell, the original depositor, allegedly made his demand for payment of his 1917 ruble deposit (R. 81, 279-280). Sewell later assigned his alleged claim to one Dougherty, in 1932 (R. 282). Dougherty had become the assignee of a number of other ruble depositors in defendant's Russian branches and, while owner of the Sewell claim, brought various test cases with respect to such ruble deposit claims against the present defendant, National City Bank. Those cases, involving issues identical to the issues in the present case, were elaborately tried before Referee Harrison Tweed and resulted in findings and judgments in favor of the defendant bank (*Dougherty* v. *National City Bank*, 157 Misc. [N. Y.] 849). Judgment was entered against Dougherty

on June 12, 1936 (R. 394-395) and, after the entry of judgment, Dougherty assigned, in October, 1936 (R. 283) the Sewell claim to the present plaintiff, Tillman, who presumably expected by such assignment to avoid the estoppel by judgment on the issues tried and determine in the *Dougherty* case.

Finally, in 1937, more than twenty years after the deposit had been made and almost nineteen years after defendant's Russian branches had been closed and long after the rubles deposited had depreciated to zero, the present suit was begun.

Questions Presented

The judgment below was properly affirmed if the Circuit Court of Appeals was right on any one of the four separate grounds upon which its decision rested: (a) the Statute of Limitations, (b) statutory novation and discharge by the acts and decrees of the Soviet Government, (c) worthlessness of the rubles of deposit, and (d) estoppel by judgment as to all material issues. The petitioner, accordingly, is hard pressed to devise some theory affording grounds for review by this Court.

I

The case involves no question relating to *Erie Railroad Co.* v. *Tompkins.*

The chief reason given by petitioner in an attempt to justify certiorari, is his claim that the Circuit Court misconstrued Section 34 of the Judicial Code, under the mistaken belief that it was compelled in this case to follow the state decisions by reason of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64. Petitioner urges that where, as here, federal jurisdiction derives, not from diversity of citizenship, but from the federal ground that the case involves foreign banking by a national bank (12 U. S. C. A., Sec. 632, quoted in petition, p. 10), the federal courts are not

compelled to follow state law and that the *Erie* case does not apply.

Whether or not petitioner is correct in his construction of the law as established by the *Erie* case, is wholly unimportant in this case. Neither the trial court nor the Circuit Court of Appeals purported to place their decision on a compulsory application of state law, a holding which plaintiff now asserts would have been erroneous. The view of the courts below was that *all* applicable decisions, both in the state and in the federal courts, were in accord and prevented a recovery by the plaintiff. Plaintiff cites no authority to establish any different rule of law which might have been applied in deciding this case, but which the lower courts felt constrained not to apply because of the rule laid down by this Court in the *Erie* case.

Neither the oral opinion of the trial judge nor the elaborate written opinion of the Circuit Court of Appeals even mentions the Judicial Code, the *Erie R. R. Co.* case or any decisions relating to that problem. The only reference to that case we have been able to find below, was the assertion of petitioner's own counsel at the trial (R. 83) that in assessing damages the court was constrained by the *Erie* case to follow the state rule and to assess damages as of the date of plaintiff's alleged demand in 1931 (the "breach date"); while the defendant specifically pointed out in its brief in the court below (p. 23) that it was not necessary to determine the date for assessing damages (*i. e.*, the "breach date" or "judgment date") or for the court to decide whether it was required to follow the state rule under the *Erie* case, or the federal rule on this question (*Deutsche Bank* v. *Humphreys*, 272 U. S. 577), because under either rule plaintiff could recover nothing, as on both dates the pre-Soviet rubles deposited were worthless and under both the state and federal cases plaintiff was not entitled to recover on the basis of the value of the new Soviet ruble. The contention of the petitioner that the decision of the courts below was the result of a misapplication of the *Erie R. R. Co.* rule is thus pure fantasy.

The opinion of the Circuit Court of Appeals unquestionably cites New York decisions as highly persuasive precedent but, far from indicating that it was following them out of any constraint, expressly states that the decisions are sound and that it agrees with them. If it had refused to follow them some question of the *Erie* case might have arisen.

In a strained effort to give the impression that the Circuit Court erroneously felt compelled to follow the New York decisions, petitioner (p. 8) makes the following highly misleading partial quotation from the opinion:

> "We shall not review the decisions of the New York Court * * *."

What the Court really said was that it would not reconsider questions of law which the New York *and the Federal courts* had previously decided:

> "We shall not review the decisions of the New York courts or of this court in *Tillman* v. *Russo-Asiatic Bank*, 51 F (2d) 1023, cert. denied 285 U. S. 539, that the rubles such as the defendant contracted to pay were no equivalent for the other currencies of the same name."

Similarly on the other questions involved, the Court below cited not only New York cases but also decisions of this Honorable Court.

II

On the merits the decision is sound.

Every issue involved in the present case has been previously litigated both in the state and federal courts, with decisions invariably in favor of defendant after the Soviet Government was recognized. Petitioner relied in the courts below on certain New York decisions rendered prior to the recognition of the Soviet Government, which, in so far

as they hold anything contrary to the results reached here, have been overruled or distinguished since the Soviet was recognized as the *de jure* government of Russia (*Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71).

(a) That the New York six-year statute of limitations barred this nineteen-year-old claim has been decided on identical facts (*Dougherty* v. *National City Bank*, 157 Misc. 849; *Day-Gormley* v. *National City Bank*, Moscowitz, *J.*, S. D. N. Y., Dec. 23, 1935, affd. 89 F. (2d) 703, cert. denied 302 U. S. 719).

The New York courts have previously and repeatedly held that where a branch bank closed, either by compulsion or voluntary act, frustrating the demand deposit contract, a cause of action for restitution immediately arose without the need of a demand (*Sokoloff* v. *National City Bank*, 250 N. Y. 69, 80; *Tillman* v. *Guaranty Trust Co.*, 253 N. Y. 295, 297), and that the plaintiff "cannot extend the time within which an action may be brought by postponing his choice of alternative remedies" (*Parker* v. *Hoppe*, 257 N. Y. 333, 341).

(b) That a party making a demand deposit of pre-Soviet rubles in a bank in Russia is not entitled to recover in present-day Soviet rubles, and that a claim payable in Russia in pre-Soviet rubles is worthless, where no demand for payment was made at any time when the rubles had value, has been repeatedly held both by the New York courts and by the federal courts (*Tillman* v. *Russo-Asiatic Bank*, 51 F. (2d) 1023, cert. den. 285 U. S. 539; *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71; *L. C. Smith & Bros. Typewriter Co.* v. *Credit Lyonnais*, 266 N. Y. 126; *Klochkov* v. *Petrogradski M. K. Bank*, 266 N. Y. 596; *Dougherty* v. *National City Bank*, 157 Misc. 849; see *Deutsche Bank* v. *Humphrey*, 272 U. S. 517, *Succession of Serralles* v. *Esbri*, 200 U. S. 103).

The same thing has been held in Russia and elsewhere [Circular *re* Deposit in Former Savings Banks (R. 506, fols. 1516, 1518); *Johannson* v. *Kunst & Albers*, Supreme

Court of R. S. S. R. (R. 513, fol. 1539); *Credit Lyonnais* v. *Credit National Industriel*, Dalloz Fort. Coll. Jur. 1927, p. 261 (Paris Court of Appeals); *Charalambos Papadopolous* v. *Monastery of Mount Minai*, 17 Gazette des Tribunaux Mixtes 293 (Egyptian Court of Appeals); see *Franklin* v. *Westminster Bank, Ltd.* (Kings Bench Div., May 13, 1931, unreported)].

(c) That the Soviet decrees operating upon obligations made and repayable in Russia are effective to discharge such obligations, has been repeatedly enunciated in many decisions, involving identical or analogous questions (*Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71; *Dougherty* v. *National City Bank*, 157 Misc. 849; *United States* v. *Belmont*, 301 U. S. 324; *Zimmerman* v. *Sutherland*, 274 U. S. 253; *Re Russian Bank of Foreign Trade*, [1933] 1 Ch. 745, 746).

III

No procedural errors were committed.

(a) Petitioner contends that the courts below erred in excluding evidence of his "expert" on Russian law. The trial court did not deny plaintiff the use of an expert. What it did was to exclude a number of incompetent, general and conclusory questions. The witness had been a lawyer in Imperial Russia but apparently had never practiced in the Soviet courts. Nothing was shown to indicate that the witness had any special knowledge of Soviet law other than that acquired by reading the *written* decrees, decisions and regulations which are in evidence.

It is well settled that where, as here, foreign law is embodied in written statutes, the court, not the jury, must determine that law and is not bound by the opinion of any expert (*Eastern Bldg. & Loan Assn.* v. *Williamson*, 189 U. S. 122, 126; *Finney* v. *Guy*, 189 U. S. 335, 342; *Mexican National Railway Co.* v. *Slater*, 115 F. 593, affd. 194 U. S.

120; *Scheer* v. *Rockne Motors Corp.*, 68 F. (2d) 942, 945; *Merinos Viesca* v. *Pan-American P & T Co.*, 83 F. (2d) 240; *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, 78).

The extent to which the general statements and conclusions of a legal "expert" will be admitted under such circumstances is a matter for the sound discretion of the trial court (*Hennessy* v. *Farrelly*, 13 Daly 468, 471; *Bollinger* v. *Gallagher*, 170 Pa. 84; *Molson's Bank* v. *Boardman*, 47 Hun 135).

As was pointed out by CARDOZO, *J.*, in *Petrogradski M. K. Bank* v. *National City Bank*, 253 N. Y. 32, 35, with respect to the value of testimony in Soviet law by emigrant Russian lawyers trained in Imperial Russia:

> "There is little in the practice or training peculiar to a Russian lawyer that enables him to speak as to such matters with any special measure of assurance or authority."

Petitioner's further contention that the Trial Court erroneously refused to take his so-called offer of proof at the end of the trial is unsound and in no event would constitute reversible error. No offer of proof was actually made (R. 238-239). The offer of proof contemplated by Rule 43 of the Federal Rules of Civil Procedure is an offer of proof made at the time when the objection is sustained to a particular question relating to a particular matter. The Rule certainly does not contemplate that at the end of a trial a party may make a general statement of what he claims he would have proved if no objections had been made to any of his questions. It obviously is intended to permit the trial court to rectify erroneous rulings on evidence during the course of the trial, as well as to preserve for appeal clear-cut issues on the rulings actually made. A general statement at the close of the trial would accomplish neither purpose.

(b) The trial court committed no error by admitting in evidence the findings and judgment in *Dougherty* v. *National City Bank*, 157 Misc. 849. That case involved this same defendant and this plaintiff's predecessor in title, who at the time owned plaintiff's claim. Every disputed issue involved in this case was tried there, and was the basis of findings which we contend constitute an estoppel as to such issues.

The trial court did not deem it necessary to base its decision upon this estoppel but passed upon the issues *de novo*. The Circuit Court of Appeals agreed with the decision of the trial court and also pointed out that the estoppel by judgment constituted a further and *additional* reason for the dismissal of the complaint.

Petitioner's present contention that this evidence should not have been admitted because res judicata was not affirmatively pleaded as a defense, is both unavailable to petitioner and unsound in law.

As the Circuit Court of Appeals stated, petitioner expressly waived at the trial any procedural objection to the admission of the findings and judgment (R. 59, fol. 176; R. 52-53, fols. 156-159), and reserved merely the substantive question as to whether such findings and judgment constituted an estoppel binding upon this plaintiff.

Moreover, it is settled, both by decisions of this Court and of the New York courts, that where findings and judgment in another action are offered in evidence, merely as determinative of particular issues in the case, rather than res judicata of the cause of action, it need not be pleaded (*T. B. Harms* v. *Stern*, 229 Fed. 421; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 59-60; *Krekeler* v. *Ritter*, 62 N. Y. 372). There is nothing in the Federal Rules of Civil Procedure which changes this rule, and no such objection was raised by plaintiff. Plaintiff made no claim of surprise, as he knew long before this trial the contention which defendant intended to make.

On the substantive question, it is well settled that, where a party owns several causes of action against the same defendant and chooses to litigate one cause of action,

the judgment is binding on the plaintiff as to the common issues litigated, if plaintiff subsequently sues on the other cause, and of course parties in privity with the original plaintiff are similarly bound (*Southern Pacific R. R. Co.* v. *United States,* 168 U. S. 1; *New Orleans* v. *Citizens Bank,* 167 U. S. 371, 396; *Tait* v. *Western Maryland Railway Co.,* 289 U. S. 620, 623; *Good Health Dairy Products Corp.* v. *Emery,* 275 N. Y. 14, 18; *National Surety Co.* v. *Breauchaud,* 173 App. Div. 795).

Petitioner attempted to distinguish these authorities on the theory that the principle has no application where the owner of the two causes of action had himself acquired title to such claims by assignment. No reason is advanced why this should make any difference.

The old case of *Nathan* v. *Uhlmann,* 101 App. Div. 388, relied upon by petitioner, is readily distinguishable. There the *plaintiff* was seeking to use a judgment obtained by him in one assigned cause of action as res judicata in favor of himself on another assigned cause of action. The New York courts have clearly indicated a distinction between the scope of res judicata when used by a plaintiff as a sword, and its much wider scope when used by a defendant as a shield. (Cf. *Elder* v. *New York & Pa. Motor Express, Inc.,* 284 N. Y. 350, 353, and *Good Health Dairy Products Corp.* v. *Emery,* 275 N. Y. 14, 18; see also *Bradford Electric Co.* v. *Clapper,* 286 U. S. 145, at 160.)

Moreover, what was said on the point in *Nathan* v. *Uhlmann* was, as the Circuit Court of Appeals pointed out, *dictum.* In that case, the plaintiff lost at the trial and appealed on several grounds, among them the exclusion of evidence of the judgment in the previous action. The Appellate Division, while refusing to disturb that ruling, nevertheless reversed on other grounds. The affirmance by the Court of Appeals did not even remotely involve this point since the plaintiff, having obtained a reversal, was satisfied with the judgment below, and since the defendant, of course, merely appealed from the granting of a new trial on the other ground.

Petitioner's further claim, that the doctrine of estoppel does not apply because certain facts in the *Dougherty* case were stipulated, has no foundation. The only facts stipulated in that case were put in evidence in the present case by uncontradicted testimony. Irrespective of this, under the authorities, findings, even if dependent upon a stipulation, are as binding as though reached after testimony, or established in any other way (*Tait* v. *Western Maryland Railway Co.*, 289 U. S. 620, 626; *Crouse* v. *McVicker*, 207 N. Y. 213, 217).

However, regardless of whether or not the judgment in *Dougherty* v. *National City Bank*, 157 Misc. 849, is deemed to constitute a binding estoppel in this case on the issues there litigated, the judgment below must stand, since the trial court considered the issues *de novo* and the Circuit Court of Appeals agreed that the judgment below was correct without regard to any question of estoppel.

Conclusion

The decision of the Circuit Court of Appeals is correct. It is not in conflict with any decision of this court or of any other Circuit Court of Appeals. It is in accord with numerous decisions in the state court and with the principles previously enunciated by this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP A. CARROLL,
Counsel for Respondent.

JOSEPH M. PROSKAUER,
J. ALVIN VAN BERG,
of Counsel.

CPY5700

No. 293

FILED
OCT 3 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

JAMES A. TILLMAN,

Petitioner,

AGAINST

THE NATIONAL CITY BANK OF NEW YORK,

Respondent.

Supplemental Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

BORRIS M. KOMAR,
Counsel for Petitioner.

JEFFREY PRESS, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

JAMES A. TILLMAN,

Petitioner,

against

THE NATIONAL CITY BANK OF NEW YORK,

Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

I.

The interpretation of *Erie R. R. Co.* v. *Tompkins* is directly involved.

The respondent, apparently, concedes that if the Circuit Court of Appeals considered itself bound by the State decisions in this case, grave questions arise as to its correctness in applying the doctrine of *Erie R. R. Co.* v. *Tompkins*, in view of the language of Section 34 of the Judicial Code and the Act of June 16th, 1933*; yet it insists that no such question was raised by the parties below, nor that the decision of the Circuit Court shows that it deemed itself so bound by the State Law.

In its brief in the Circuit Court, the respondent urged at page 15 (and again at page 23):

> "Even aside from *res judicata, this decision is conclusive as to the state law, which the Federal courts must follow (Fidelity Union Trust Co.* v. *Field;*

*Set forth in full at page 10 of the original petition.

> *West* v. *American Telephone & Telegraph Co.*, 9 U. S. L. Week., pp. 4059, 4052, U. S. Sup. Ct. 12/10/40)."

Respondent's argument of the appeal below was based almost exclusively upon the insistence that the decision of the referee in the State case (*Dougherty* v. *National City Bank*, 157 Misc. 849), in which he decided that the statute of limitations would not bar a claim for the return of plaintiff's deposit, and then proceeded to express his views on other contentions of the defendant, with a remark that they were not necessary to the decision (thus making that portion of his opinion a mere dictum), was binding upon the Federal Court.

Immediately after the argument, petitioner's attorney wrote a letter to the Judges of the Circuit Court stating:

> "Upon the argument of the above appeal, great stress was laid by Judge Proskauer upon the duty of your court to follow the decision of Referee Tweed as expressing state law binding on the Federal Court. Since, owing to the lack of space, this point has not been touched upon in my reply brief and there is nothing upon it in my main brief, I am taking the liberty of addressing this letter to the court."

He then discussed the decision of Referee Tweed with regard to the statute of limitations, pointing out that he did not hold that the petitioner's cause of action based on a deposit relationship, was barred by it and proceeded to quote the Referee's language:

> "'Strictly, it is unnecessary to consider the other defenses. However, for the sake of completeness and to assist counsel in the preparation of findings, I shall state my conclusions with respect to the sufficiency of these defenses as applied to a cause of action for breach of contract or rescission and res-

> titution. I cannot pass upon the validity of the defenses as applied to a cause of action based upon the alleged existence of a deposit relationship between the depositor and the home office of the bank. I have already found that no such cause of action exists. It is impossible to test the sufficiency of a defense as against the cause of action which merely might have existed under another state of fact and law.' * * *"

The letter then proceeded:

> "Thus, other conclusions of Referee Tweed were concededly mere dicta. The Federal Court is bound only by actual decisions of state courts and not by the dicta (*Carroll* v. *Carroll*, 16 How. 275; *Graham* v. *Englemann*, 263 Fed. 166; *In re Sullivan*, 148 Fed. 815; *Knight* v. *Shelton*, 134 Fed. 423; *Southern R. Co.* v. *Simpson*, 131 Fed. 705; *Wiemer* v. *Louisville Water Co.*, 130 Fed. 251; *Matz* v. *Chicago etc. R. Co.*, 85 Fed. 180)."

This "another state of fact and law" in Russia, petitioner partly presented and partly was deprived of presenting in this case by the rulings of the courts below, excluding testimony of petitioner's expert on Russian law.

The entire theory of respondent's defenses is predicated upon the legal effect to be accorded to Russian law and events that transpired in Russia, yet nowhere does either the District Judge or the Circuit Court of Appeals make any attempt to assay independently such law or events, or to determine their legal effect. Instead, sole reliance is had on the determination of Referee Tweed.

Even a mere cursory examination of the opinion of the Circuit Court shows that it has been influenced by the insistence of the defendant that it is bound to follow the decision of Referee Tweed. Not only had it started its

decision with it, but it took two-thirds of its opinion by the discussion of Tweed's decision.

In the course of that discussion, it said:

> "The so-called estoppel is no mere technicality but a reasonable measure calculated to save individuals and courts from *the waste and burden of relitigating old issues. Eissing Chemical Co.* v. *People's Nat. Bank of Brooklyn*, 205 App. Div. 89, 91, aff'd 237 N. Y. 532; *Sargent & Co.* v. *New Haven Steamboat Co.*, 65 Conn. 116, 126; *Bennett* v. *Commissioner*, 113 F. (2d) 837, 839. Tillman, to whom Dougherty assigned the claim in suit, stands in the same situation as Dougherty himself.
>
> "It may be argued that if Dougherty had brought the present action he would not have been precluded by the former judgment because the claims would have been derived from different assignors. But all the claims, however derived, were for payment of roubles deposited with the same bank during the same period, the parties would have been the same and the issues on which their rights depended would have been identical. *No good purpose could be served by relitigating such issues*" (R., 561-2).

Thus, it twice repeated that it will not permit the plaintiff to "relitigate such issues". It backed up this viewpoint by stating, "We shall not review the decisions of the New York Courts or of this Court * * *". It reiterated its agreement with Mr. Tweed on the question, which he said he was compelled to decide against the plaintiff in the *Dougherty* case because of the plaintiff's stipulation, although this petitioner did not so stipulate, and the record shows that no such facts in reality existed with regard to the closure of defendant's Russian branches (fol. 6).

It then referred to some more State cases and said, "This has been held in many decisions" (R., 564).

It is well settled that this Honorable Court is entitled to look to the opinion of the court below to ascertain what it actually did in the case (*Fire Association of Philadelphia* v. *People*, 119 U. S. 110; *Delmas* v. *Merchants Ins. Co.*, 81 U. S. 661; *Burbank* v. *Ernst*, 232 U. S. 166).

The respondent insists that the decision of the Circuit Court was based on all cases decided both in the State and in the Federal Courts. There are no cases decided in the Federal Courts on the questions herein involved, and the sole reason the Circuit Court of Appeals followed Referee Tweed's decision is not that it believed it to be persuasive, but because the respondent insisted that it was binding upon it.

In either case, whether persuasive or obligatory, Referee Tweed's decision was not in accord with the decisions of higher New York courts, and a failure to follow the decisions of the proper State courts by the Federal Court, even in a case where the State law controls, is an error which this court, under its rules, will review by certiorari.

II.

The merits of plaintiff's case were not considered below.

Under its Point II, the respondent insists that the decision of the Circuit Court of Appeals was sound on the merits. But the Circuit Court has not considered the merits of the plaintiff's case. Despite the respondent's unfounded assertion to the contrary, the only decision that it relies on is that of Referee Tweed in *Dougherty* v. *National City Bank*, 157 Misc. 849. That decision rested, not upon the proof of facts contained in the record, but upon plaintiff's concession of controlling facts otherwise unsupported by the record. The Referee also lamented that he

was compelled to interpret the Russian law, without the aid of an expert.*

(a) Even Referee Tweed in *Dougherty* v. *National City Bank*, 157 Misc. 849, held that the cause of action based on a deposit is not barred by the New York six year statute of limitations. He did hold that the causes of action based on breach or rescission of contract are barred (pp. 855-850 and 861). Were he to so hold, his decision should have been disregarded by the Circuit Court of Appeals, because of the three decisions of the Appellate Division (*Richards* v. *National City Bank*, 231 App. Div. 559, 566; *Bank of U. S.* v. *National City Bank*, 123 Misc. 801, aff'd 214 App. Div. 716; *Sokoloff* v. *National City Bank*, 130 Misc. 66, 73, aff'd 223 App. Div. 754). The last was affirmed in 250 N. Y. 69 in an opinion by Cardozo, C. J.

Plaintiff does not claim any alternative remedy, and, thus, reference to *Parker* v. *Hoppe*, 257 N. Y. 333, is futile.

Sokoloff v. *National City Bank*, 250 N. Y. 69, dealt with a case where a prior demand was made at the branch (p. 82).

Tillman v. *Guaranty Trust Co.*, 253 N. Y. 295, was a case of a direct repudiation of liability by the bank.

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*He said: "No **Imperial Russian law has been proved** other than the Pravila. * * *" (p. 858) "* * * the plaintiff has the burden of presenting to the court the law which creates the obligation and relationship upon which he relies. **He has presented only the Pravila**" (p. 858) "* * * It is not claimed that the Soviet law did anything of the sort, and **no Soviet law on** the subject is in evidence" (p. 859). * * *

"The fact that the personnel of the Credit Lyonnais and the Equitable Life Assurance Society remained in Russia and were permitted to do business, at least to some extent, and to take part in the liquidation proceedings, raises a doubt whether the ejectment of the personnel of the National City Bank was a governmental act inspired solely by the fact that they were conducting the business of a branch of a foreign bank and for the purpose of preventing a continuation of that business. However, in view of the concurrence of counsel for both parties that the closing was by act of the Soviet government and that the continuance of business would have been prevented by governmental force, I feel that I may properly so find. If that be the fact, then the failure of the personnel of the defendant to co-operate and participate in the liquidation proceedings is excused as a matter of law" (p. 861).

(b) Here the respondent argues that a general deposit of lawful tender money in the bank is repayable in the same issue of currency in which the deposit is made. The contrary is the law (*Legal Tender Cases*, 12 Wall. 457; *City of San Juan* v. *St. John's Gas Co.*, 195 U. S. 510, 520; *Thompson* v. *Riggs*, 5 Wall. 663, 678; *Matter of Lendle*, 250 N. Y. 502, 506; *Metropolitan Bank* v. *Van Dyck*, 27 N. Y. 400, 487; *Marine Bank of Chicago* v. *Chandler*, 27 Ill. 525 .547-8; *Marine Bank of Chicago* v. *Rushmore*, 28 Ill. 462, 478; *British Bank for Foreign Trade, Ltd.* v. *Russian Commercial and Industrial Bank*, 38 Times L. R. 65). The cases cited by the respondent are distinguished in note 3 at page 9 of our original petition.

(c) The record contains no Soviet decrees discharging the respondent from obligation to petitioner to repay petitioner's deposit. The Russian expert testified that no such Soviet law exists (fols. 554, 561, 567-8). He was not cross-examined by the respondent. Respondent's cases are distinguished in note 4 at page 9 of the original petition.

III.

Respondent fails to excuse grave procedural errors resulting in denial of justice to petitioner.

(a) The respondent has not objected to the qualifications of plaintiff's expert on Russian law (fol 388). The record shows that the expert continued to practice in Soviet Russia until 1920 (fol. 385), i. e. long after the decrees in question have been enacted. The respondent does not deny that the decision of the Circuit Court of Appeals here is contrary to the controlling decisions of this court as to the admission of expert testimony (cited at page 12 of our original petition) and to the decisions of the Circuit Courts in other Circuits (idem, pp. 12 and 13).

The rulings of the courts below resulted in the exclusion

of vital testimony for the petitioner on Soviet law in regard to the application of the defendant's charter to the facts herein (Defendant's Exhibit FFF, R., 135, 136, 138, 139, 140, 145, 150, 151, 152, 153, 159, 160, 161, 162, 163, 165, 183, 184, 185, 186, 190); the application of the Soviet currency revaluation decrees to the discharge of contracts (Defendant's Exhibits BBBB, DDDD, NN, R., 168, 170, 172); the statement and explanation of the rule of Soviet law in regard to payment of contracts in the present Soviet ruble contracted in Russia in and at the time the Imperial ruble was in circulation (Defendant's Exhibits PP, XXX, BBBB, R., 192, 193, 199, 201, 202); the rule for estimating the equivalence in Soviet rubles for debts incurred in Imperial rubles (R., 202, 209, 222, 223, 228, 239); the manner of calculating the precise amount of Soviet rubles in circulation in Russia at the time of the demand and the trial, which under the Russian law, would discharge the defendant's debt to plaintiff (R., 230, 231, 235, 240; Assigned Error 5, R., 4).

The respondent's argument with regard to the rulings below as to the proof under Civil Procedure Rule 43 is based upon a misstatement that such proof was offered "at the close of the trial". The record shows that it was offered after repeated rulings of the District Courts sustaining objections to the evidence of the expert, and in the course of the expert's examination (fols. 711-719).

(b) The respondent admits that the attempt of the Circuit Court of Appeals to sustain a decision on the alleged disapproval by the New York Court of Appeals of the ruling by the Appellate Division in regard to the estoppel in *Nathan* v. *Uhlmann*, 101 App. Div. 388 was erroneous. The respondent merely states that the ruling of the Appellate Division was a dictum, without explaining this claim.

The Appellate Division thought the question of the estoppel raised on the appeal so important that it considered it first. The reason for so doing was obvious, for if such

prior decision, operated as an estoppel on the defenses, the plaintiff in that case would be entitled to a judgment, and not to a new trial.

The Appellate Division said:

> "The last trial resulted in a verdict in favor of the defendants, and from the judgment so entered the plaintiff appeals. He contends, among other things, that the court erred in excluding as evidence the judgment in *Cassidy* v. *Uhlmann*, 54 App. Div. 205, 66 N. Y. Supp. 670, it being insisted by him that it was admissible, at least as proof of the fact that the defendants knew of the insolvency of the bank when the deposits were received. We do not think that this contention can be upheld, for the parties are not the same. They are actually different, and the judgment sought to be introduced is res inter alios acta. Here Cassidy (and now his administrator) is endeavoring to enforce the claims of depositors, but they are other and different depositors from those whose rights Cassidy sought to enforce in the other action. Each is an independent party, with an independent claim. As assignee, Cassidy had no other or different right than his individual assignors could enforce had they personally brought the action; and if we escape the confusion arising from the fact that in both actions the assignee of separate and distinct depositors is the same person, namely, Martin Cassidy, it will at once be apparent that the ruling of the trial judge was right. We are not referred to any authority which holds in substance or in principle, or from which it can be deduced, that a judgment obtained by a depositor in one action is competent evidence against the same defendant in another action, brought by another and different depositor. The exclusion, therefore, of the judgment, does not constitute ground for reversal."

This ruling of the Appellate Division was binding on the Circuit Court of Appeals under the recent decisions of this Court (*Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223).

The respondent's claim, that the doctrine of estoppel is different in the case of the defendant than in the case of the plaintiff, is without merit. Mutuality of an estoppel is one of its fundamental requisites (*Atlantic Dock Co.* v. *Mayor*, 53 N. Y. 64; *Lawrence* v. *Campbell*, 32 N. Y. 455; *Sparrow* v. *Kingman*, 1 N. Y. 242; *Hughes* v. *Clarksville*, 6 Pet. 369).

IV.

Inaccuracy of respondent's facts.

Apparently impressed with the gravity of Federal questions presented by this case regarding the interpretation of Federal statutes, particularly Section 34 of the Judicial Code, and several rules of Federal procedure, the erroneous application of the State law by the courts below, and the diversity in decisions caused by the opinion of the Circuit Court of Appeals, the respondent set out in its memorandum an alleged statement of facts, wholly unsupported by the record.

This was done, obviously, with a view to impress this court that petitioner has made out no case on the facts.

On an appeal from a judgment withdrawing the case from the jury and dismissing the complaint, facts must be deemed to be proved as claimed by the plaintiff. (*Foulke* v. *N. Y. Consolidated R. R. Co.*, 228 N. Y. 269, 271-2; *Porges* v. *U. S. Mortgage & Trust Co.*, 203 N. Y. 181, 186; *Kraus* v. *Birnbaum*, 200 N. Y. 130, 133).

The record does not show that defendant's offices and assets were seized or taken by the Soviet government. It

shows that the defendant closed its own office on the advice of the American Consul General in Moscow and left Russia voluntarily (fol. 879). The bank's property was deposited by the bank's officials with the Swedish Consulate General in Moscow (fols. 876-879), where it remained until the end of 1920, when, at the request of the bank, the Soviet government took its books in its custody to prevent their disappearance (fol. 890).

At that time, the People's Bank abolished (fols. 1463-1465) and the liquidation of all private banking in Russia was completed (fols. 1466-1480).

Even if defendant remained in Russia and submitted to the liquidation of its business, pursuant to the Soviet law, the account of Sewell, *a British subject* (R. 77), would not have been transferred to the People's Bank, but would have been included in the account of the defendant bank with the People's Bank (fol. 1444). Thus, the liability of the defendant to its foreign depositors remained unchanged under Soviet law, and no novation or statutory discharge of liability was effected by Soviet law (fols. 1437-1443).

When defendant closed its Russian branches, it had no excess of assets over liabilities (see its statement of July 30th, 1918 at fols. 1621-1624) and some of its securities included in the assets were then without any value (fol. 796).

No concession was ever made by the petitioner that the currency in which the deposit was made "became wholly worthless". On the contrary, the petitioner pleaded its value in the complaint at various dates (complaint paragraph 19 [fol. 41]; paragraphs 23-34 [fols. 43-48] and paragraphs 36-42 [fols. 48-51]).

The Soviet government did not outlaw controversies, such as this, between non-resident aliens. It has merely forbidden the Soviet Courts to entertain such actions (fol. 1506). The Soviet Commissariat of Justice in 1924, after the

Soviet law referred to by the respondent was passed, ruled with regard to the similar laws concerning American insurance companies which operated in Russia:

> "2. Contracts of life insurance were concluded with the foreign insurance companies 'New York' and 'Urbaine', as American corporate bodies, and not with the Russian branches of said corporate bodies; not only the property of the branches, operating on the territory of the former Russian Empire, at present the Union of the S. S. R., was held responsible to the Russian policyholders, but also all property which belonged to said American insurance companies in all parts of the world. *Therefore, the confiscation of the property of the Russian branches, and the termination of the activity of the Russian branches, in consequence of the Decree of the Soviet of People's* Commissars of November 28, 1918 (Collect. Enact. No. 86 Sect. 904) *does not relieve the Boards of the companies 'New York' and 'Urbaine' from the responsibility stipulated in the insurance policies to the Russian holders thereof*" (fol. 942).

The respondent does not deny that the express provisions of Rule 8 subdivision c of Civil Procedure require a proper plea before allowing a defense of an estoppel. It insists that the petitioner had waived the benefit of this rule by not moving on that ground during the trial. The record at page 244 and the original petition at page 14 cite in full this ground of opposition insisted by petitioner's counsel in the District Court. Nevertheless, the respondent continues to ignore the plain and clear record and refers to page 52 in the record, which has no bearing on this question.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out and under the seal of this Honorable Court directed to the Judges of the United States Circuit Court of Appeals for the Second Circuit.

Verification.

State of New York,
County of New York—ss.:

JAMES A. TILLMAN, being duly sworn, deposes and says as follows:

I am the petitioner herein. I have read the foregoing supplemental petition and the same is true to the best of my knowledge, information and belief.

JAMES A. TILLMAN.

Sworn to before me this
day of September, 1941.

ARCHER EISENSTAT,
Notary Public,
New York Co. Clk's No. 105.
Term expires March 30, 1943.

Certificate of Counsel.

I hereby certify that I have examined the foregoing supplemental petition, and in my opinion it is well founded and the case is one in which the prayer of the petitioner should be granted by this Honorable Court.

BORRIS M. KOMAR,
Counsel for Petitioner.